91-1424 (1)
No.

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

HONG KONG ISLANDS LINE AMERICA, S.A.,
a corporation,
Petitioner,
vs.
C-ART, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID E. R. WOOLLEY
Counsel of Record

WILLIAMS WOOLLEY COGSWELL
NAKAZAWA & RUSSELL

NEIL B. KLEIN

200 Oceangate, Suite 700
Long Beach, California 90802
(310) 495-6000

Attorneys for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

65

QUESTIONS PRESENTED

1. While conspiring with the buyer to misdeclare the value of imported goods so as to defraud U.S. Customs of revenues to which it was entitled, may a foreign seller of goods recover the entire misdeclared value of the goods from an ocean carrier who has wrongly delivered the goods to the insolvent buyer?

2. May an ocean carrier deliver goods to the buyer without surrender of the original bills of lading for the goods, where title and risk in the goods have passed to that buyer on F.O.B. Hong Kong sales terms and the bills of lading have not been negotiated by the seller to any third person?

PARTIES TO THE PROCEEDING
and
RULE 29.1 STATEMENT

1. The parties to the proceedings below were the Petitioner, Hong Kong Islands Line America, S.A., a Panamanian corporation, and Respondent, C-Art, Ltd., a Hong Kong corporation.

2. The parent company of the Petitioner is Hong Kong Islands Line S.A., a Panamanian corporation.

3. A nonparty, New York Merchandise Company, Inc., was involved in all the transactions at issue.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. C-Art and NYMCO Conspired to Defraud the Customs Service 5

2. C-Art Was Party To an Unenforceable Illegal Transaction 7

Page

REASONS FOR ORDERING SUMMARY VACATION 11

1. The Ninth Circuit Decided the Case on Illusory and Nonexistent Facts 11

2. The Uniform Commercial Code and a Prior Decision of this Court Hold that Delivery to the F.O.B. Buyer is Valid against the Seller Without Surrender of the Bill of Lading. 16

CONCLUSION. 21

APPENDIX A
ORDER DENYING REHEARING, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 6, 1991 . . . A1

APPENDIX B
OPINION, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 5, 1991 . . . . . B1

APPENDIX C
JUDGMENT, U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 25, 1989 . . . . . C1

TABLE OF AUTHORITIES

Page

Cases

A.D. Blowers & Co. v. Canadian Pac. Ry. Co.
155 Fed. 935 (9th Cir. 1907) 13

A.W. Burritt Co. v. New York C & H RR Co.
135 N.Y.S. 557 (1941) 13

Allied Chem. Int'l Corp. v. Cia. de
Nav. Lloyd Brasileiro
775 F.2d 476 (2d Cir. 1985) 14, 15

Brandon v. United States
268 F.2d 559 (9th Cir. 1959). 9

Hentz v. THE STEAMSHIP IDAHO
93 U.S. (23 Wall.) 575,
23 L.Ed. 978 (1877) 2, 19-21

J.C. Penney Purchasing Corp. v. U.S.
451 F.Supp. 973 (1978 Cust. Ct.) 8

Jay-Arr Slimwear v. U.S.
681 F.Supp. 875 (CIT 1988) 9

Kesselman v. Mid-States Freight Lines
78 R.I. 518, 82 A.2d 881 (1951) 13

Lee On v. Long,
37 Cal.2d 499 (1951), 234 P.2d 9,
cert. denied, 342 U.S. 947 (1951) 9

Lewis & Queen v. N.M. Ball Sons
48 Cal.App.2d 141, 308 P.2d 713 (1957). 10

Page

Messerall v. Fulwider
199 Cal.App.3d 1324,
245 Cal.Rptr. 548 (1988). 20

Midland Linseed Co. v. American Liquid
Fumigator Co.
183 Iowa 1046, 166 N.W. 573 (1968) 13

National Petrochemical Company of Iran v.
M/T STOLT SHEAF
930 F.2d 240 (2d Cir. 1991) 1, 7, 9, 11

S.E.L. Maduro, Inc. v. M/V SANTA LUCIA,
offic. unrep.
1987 A.M.C. 2936 (D. Mass. 1987) 10

Summers v. United States
11 F.2d. 583 (4th Cir. 1926) 9

United States v. Gantz
48 F.Supp. 323 (D. Mass. 1942) 9

Statutes

18 U.S.C. § 1001 9
19 U.S.C. § 1401a(b)(1)(B). 3, 8
28 U.S.C. § 1333(1) 2
28 U.S.C. § 1254(1) 3
49 U.S.C. § 89 17
49 U.S.C. § 91 18

Uniform Commercial Code, §2-319(1)(a). 3
Uniform Commercial Code, §2-401(2) 3, 16
Uniform Commercial Code, §7-403(1)(a). 3, 17

Page

Rules

Federal Rules of Civil Procedure,
Rule 9(h) 2

United States Supreme Court
Rules 13.1 and 13.4 3

Texts

15 *Williston on Contracts*,
§ 1752, p. 169 (3d ed. 1972) 10

J. Murray, *Murray on Contracts*,
§§ 344, 346-7 (2d ed. 1974) 10

Riegert and Braucher, *Documents of Title*,
UCC Practice Handbook,
Section 3.4.2 (1978) 18

White and Sommers, *Handbook of the Law*
Under the Uniform Commercial Code,
Section 21-3, p. 852 (2d ed. 1980) 18

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HONG KONG ISLANDS LINE AMERICA, S.A.,
a corporation,
Petitioner,
vs.
C-ART, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Hong Kong Islands Line America, S.A. ("HKIL"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in favor of Respondent C-Art, Ltd. ("C-Art"), entered in the above proceeding on August 5, 1991, and from which a petition for rehearing was denied on December 6, 1991, on the grounds that the opinion is in irreconcilable conflict with a decision of the Second Circuit, *National Petrochemical Company of Iran v. M/T STOLT SHEAF*, 930 F.2d 240 (2d Cir. 1991), and allows recovery on a contract tainted by illegality.

Alternatively, petitioner prays that this Court grant *certiorari* and then summarily vacate the opinion of the

Ninth Circuit, remanding to that Court with instructions to reconsider the actual facts and to apply the rule of *Hentz v. The IDAHO*, 93 U.S. (23 Wall.) 575 (1877).

OPINIONS BELOW

The order of December 6, 1991 of the United States Court of Appeals for the Ninth Circuit denying HKIL's Petition for Rehearing is reprinted as Appendix A hereto.

The opinion of August 5, 1991 of the Court of Appeals for the Ninth Circuit is reported at 940 F.2d 530, and is reprinted as Appendix B hereto.

The decision of District Judge Robert C. Bonner of the United States District Court for the Central District of California has not been reported. The judgment of August 25, 1989, the order re judgment, and the Court's oral findings at trial are reprinted in Appendix C hereto.

JURISDICTION

C-Art initially filed this action against HKIL in the United States District Court for the Southern District of New York, invoking jurisdiction on the grounds that it was an admiralty or maritime claim. Jurisdiction of this action does lie in admiralty and was presumably invoked pursuant to 28 U.S.C. § 1333(1) and Rule 9(h) of the Federal Rules of Civil Procedure. (See the Ninth Circuit's opinion at Section II, 940 F.2d at 532.) The action was transferred to the Central District of California in April, 1988. The case was tried in admiralty before the Court without a jury and judgment was entered in favor of C-Art and against HKIL on August 25, 1989 for $185,997.65.

Following HKIL's timely appeal, the Ninth Circuit affirmed the Central District's decision. HKIL filed a timely petition for rehearing in August, 1991 and suggested a rehearing en banc. Both the petition and the suggestion for rehearing en banc were rejected on December 6, 1991.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1) and the 90 day period of Supreme Court Rules 13.1 and 13.4, while the underlying federal basis of jurisdiction lies in admiralty.

STATUTES INVOLVED

The Tariff Act of 1930, 19 U.S.C. § 1401a.

The Uniform Commercial Code, § 2-319(1)(a); § 2-401(2); § 7-403(1)(a).

STATEMENT OF THE CASE

Plaintiff C-Art (properly C-Art Ltd.) was an exporter from Hong Kong of small items in large quantities. NYMCO (properly New York Merchandise Company, Inc.) was a New York-based importer of such goods. NYMCO bought C-Art's goods on F.O.B. Hong Kong sales terms. NYMCO did not pay C-Art for these goods, but had arranged that HKIL (properly Hong Kong Islands Line America S.A.) would carry the goods at NYMCO's expense from Hong Kong to California. On a series of occasions in 1986, NYMCO represented to HKIL that it was entitled to delivery of the goods, even though it was not able to produce the negotiable bills of lading; and HKIL made delivery. Thereafter, NYMCO

obtained bankruptcy protection, and never paid C-Art for the goods.

C-Art first filed a claim in NYMCO's bankruptcy for the value of the goods, and only later filed suit in District Court against HKIL for wrongful delivery.

C-Art's case against HKIL was based upon its continued possession of the original negotiable ocean bills of lading issued by HKIL. These bills of lading each state that the goods shall be delivered upon surrender of the original, properly endorsed bills of lading.

HKIL's defense was based upon two alternative legal positions: either C-Art was only a Buying Agent for NYMCO (in which case C-Art had no standing to sue for wrongful delivery, since delivery was properly made to C-Art's principal), or C-Art sold the goods F.O.B. Hong Kong to NYMCO and never negotiated the bills of lading to any third party (in which case C-Art had no right to recover since delivery was made to the holder of the underlying paramount title, NYMCO).

At trial C-Art admitted that it had declared itself as NYMCO's buying agent in all documents submitted to U.S. Customs in connection with the goods, but it denied that it was an agent in actual fact, and contended that it was a principal seller of goods to NYMCO on F.O.B. Hong Kong terms. It contended that the buying agency agreement and the documents manufactured thereto were created as "an accommodation on the part of C-Art to allow NYMCO to avoid paying customs duties on that portion of the total purchase price designated as C-Art's 'commissions'." (940 F.2d at 534.)

The District Court found that C-Art sold goods as principal to NYMCO on F.O.B. Hong Kong terms and that, as the recipient of HKIL's contractual promise to deliver the goods only upon surrender of the bills of

lading, it was entitled to recover for breach of contact from HKIL the value of the goods which it had sold to NYMCO. HKIL appealed the trial ruling on the grounds that C-Art was indeed a buying agent, but that if it was not, then NYMCO as the owner on F.O.B. terms was entitled to delivery under the rule of *Hentz v. The IDAHO*. During the appellate process, C-Art stated inescapably that it had engaged in sharp practice with NYMCO in arranging the sales contracts to reduce the customs duties payable, thereby raising the issue of illegality in unambiguous terms. The Ninth Circuit sustained the judgment of the District Court, but on new grounds: it accepted but condoned the agreement between C-Art and NYMCO to defraud the Customs Service, and it created a series of facts that had not existed at trial (and which had been rigorously excluded). These new facts enabled it to find HKIL "absolutely liable" (940 F.2d at 533, fn. 2), and to disregard the case law and statutory authority granting a defense to carriers who deliver to F.O.B. buyers without bills of lading.

REASONS FOR GRANTING THE WRIT

1. C-Art and NYMCO Conspired to Defraud the Customs Service.

C-Art and NYMCO entered into a formal written Buying Agency agreement (the "Buying Agreement") in early January, 1977, whereby C-Art agreed to act as NYMCO's buying agent in Hong Kong for the purchase of goods in return for a buying commission. "New York Merchandise Company, Inc. hereby appoints C. Art Ltd. as a Buying Agent in Hong Kong . . . C. Art Ltd. will be entitled to a buying commission . . ."

This agreement was submitted to U.S. Customs. The documents prepared by C-Art for shipping the goods purchased from Hong Kong manufacturers to NYMCO in the United States under the Buying Agreement included, among others, C-Art's commercial invoices and U.S. Customs Form 5515. Each such document identified C-Art's buying commission and excluded it from the calculation of NYMCO's dutiable Hong Kong purchase price. It has been admitted by C-Art that it prepared the documents in this manner so that NYMCO could avoid paying U.S. customs duty on that portion of the sale price characterized as a "commission." The present case involves approximately 20 separate commercial invoices and Customs Form 5515, each reporting that C-Art was NYMCO's buying agent on a commission basis.

The District Court decided that C-Art sold the goods on F.O.B. Hong Kong terms to NYMCO as an independent seller, rather than as NYMCO's buying agent, and that the "buying commissions" indicated on Form 5515 were in fact not true commissions, but merely an "accommodation" on the part of C-Art to allow NYMCO to "take advantage of certain Customs' regulations" so as to avoid paying U.S. customs duties on the commission. The Ninth Circuit upheld the District Court's findings, and stated that the commission arrangement was actually a ruse to avoid the payment of U.S. customs duties.

> "In upholding the district court's findings that the non-existent 'commission' arrangement was actually a ruse to avoid payment of customs duties, we certainly do not condone what appears to be an admitted disregard of United States Customs laws. Any such violation is a matter for

> consideration by federal agencies and not a matter to be resolved in this appeal."

940 F.2d 530 at fn 4, p. 535

However, by allowing C-Art to deny the evidence of its sworn Customs documents and to recover damages (including sums that should have been paid to Customs as import duties) the Ninth Circuit has condoned, and even sponsored, a breach of law. The effect of the present judgment would be to reward C-Art as a principal in an illegal transaction for violating the customs laws of the United States.

2. C-Art Was Party To an Unenforceable Illegal Transaction

It is axiomatic that a contract which has an illegal objective is unenforceable at common law. The illegality of the contract constitutes a bar to its enforceability in all circumstances.

In deciding to give C-Art the benefit of damages under an illegal sales contract, the Ninth Circuit is squarely in conflict with the Second Circuit. In *National Petrochemical Company of Iran v. M/T STOLT SHEAF*, 930 F.2d 240 (2d Cir. 1991), the plaintiff brought an admiralty action against an ocean carrier for failure to deliver certain chemicals transported from the United States to Iran. An Executive Order signed by the President of the United States had prohibited the export of chemicals from the United States to Iran. The plaintiff had attempted to obtain the chemicals from the United States by entering into an illegal scheme to purchase them through a series of middlemen. However, due to the outbreak of the Iran-Iraq war, the goods never

arrived in Iran and were resold in Taiwan. The Second Circuit, applying New York law, held that dismissal of the action against the ocean carrier for damages was mandated because an illegal transaction could not be enforced in a United States court, even collaterally. The Court ruled that the plaintiff could not recover against the carrier since public policy forbade a Court from aiding a party in its attempt to recover damages in a transaction tainted by illegality. Recovery for misdelivery under the bills of lading was prohibited by the underlying illegality of the sales contract.

In this case, C-Art recovered damages against HKIL even though, as a party to the Buying Agreement pursuant to which the goods were shipped, C-Art was involved in an agreed course of conduct with NYMCO to perpetrate a fraud on the U.S. government by robbing it of customs revenues. Specifically, C-Art knowingly assisted NYMCO in violating U.S. Customs law by inserting false commissions in the U.S. Customs Form 5515, which resulted in less customs duty being levied on the goods than required by law under the Tariff Act of 1930.[1]

---

[1] Merchandise imported into the United States is appraised for customs duty purposes on the "transaction value," based on the price actually paid for the merchandise *plus* "any selling commission incurred by the buyer . . ." 19 U.S.C. § 1401a(b)(1)(B).

However, commissions paid to *bona fide* buying agents do not form part of the dutiable value of the imported merchandise. *See Jay-Arr Slimwear v. U.S.*, 681 F.Supp. 875 (CIT 1988). The *Jay-Arr* case is one of a succession of cases in which the Customs Service litigated tenaciously to define with great specificity the parameters of a *bona fide* buying agency. *See also J.C. Penney Purchasing Corp. v. U.S.*, 451 F.Supp. 973 (1978 Cust. Ct.), and cases cited in *Jay-Arr.*

(continued)

Such a transaction is prima facie illegal: a false statement to the Treasury Department (which includes the Customs Service) is punishable as a crime under 18 U.S.C. § 1001 pursuant to *Brandon v. United States*, 268 F.2d 559 (9th Cir. 1959), and such a statement can arise from the filing of a certificate (*Summers v. United States*, 11 F.2d 583 (4th Cir. 1926)) or from submission of an invoice (*United States v. Gantz*, 48 F.Supp. 323 (D. Mass. 1942)). In this case C-Art submitted certificates (Forms 5515) and its own invoices certifying to the validity of its Buying Agency and its commission compensation — and did so in each of the twenty or so instances involved here.

As a result of the agreement of C-Art and NYMCO to submit false records of commission sales to the Customs Service, the revenues of the United States have been deprived of income which is statutorily due them. By allowing C-Art to receive damages in full as a principal for wrongful delivery where it had represented to Customs that it was entitled only to commissions, the Ninth Circuit has condoned a fraud, despite its pious words to the contrary.

The *STOLT SHEAF* case was decided under New York law. The result would be the same under California law. In *Lee On v. Long*, 37 Cal.2d 499 (1951), 234 P.2d 9, *cert. denied*, 342 U.S. 947 (1951), the Court stated that a plaintiff may not recover damages from a third party if his case is dependent upon an illegal transaction to which he is party. California Courts have repeatedly

---

(fn. continued)
With respect to the Customs Service, C-Art was holding itself out to be a *bona fide* buying agent; but with respect to the District Court here it successfully contended it was not!

recognized the breadth of the basic principal that contracts tainted by illegality are unenforceable.[2]

Indeed, it is not so much a matter of New York or California law as a basic principle of jurisprudence that a Court cannot enforce an illegal transaction to the detriment of an innocent third party.[3] J. Murray, *Murray on Contracts*, §§ 344, 346-7 (2d ed. 1974). Further, an agreement "which is directly connected with an unlawful transaction or plan will not be enforced." *See* 15 *Williston on Contracts*, § 1752, p. 169 (3d ed. 1972).

Clearly, C-Art engaged in an "unlawful transaction" by knowingly shipping goods from Hong Kong to the United States in a manner whereby NYMCO would pay less U.S. customs duties to the United States government than required by law. The Court should not have awarded damages against HKIL, an innocent third-party, in the amount of the illegal transaction, since the claim for damages was directly connected with C-Art's illegal transaction under the Buying Agreement. In creating a right to recover damages the Ninth Circuit in this case

---

[2] In this regard, it is generally not considered an impediment that the parties did not raise the issue of illegality in such terms at trial, because of the very strong revulsion of the courts at lending aid to illegality. *See Lewis & Queen v. N.M. Ball Sons*, 48 Cal.App.2d 141, 308 P.2d 713 (1957). HKIL first raised the illegal nature of the transaction in its Reply Brief to the Ninth Circuit, *after* C-Art had insisted in its Opposition that it was a principal and seller and a party "to the overall scheme to avoid paying duty on that portion of the price which it could characterize as a commission."

[3] See, for example, *S.E.L. Maduro, Inc. v. M/V SANTA LUCIA*, offic. unrep., 1987 A.M.C. 2936 (D. Mass. 1987), a case involving bribery where the Court stated that it would not enforce a maritime contract procured through illegality, regardless of which state's law governed the contract. Specifically, the Court did not want "to be placed in the position of enforcing a contract that [was] either illegal or contrary to public policy." *Id.* at 2942.

has created a clear conflict with traditional law and particularly as to a similar bill of lading transaction in the *STOLT SHEAF* case.

REASONS FOR ORDERING SUMMARY VACATION

1. The Ninth Circuit Decided the Case on Illusory and Nonexistent Facts.

In the normal course of events for shipments by C-Art to NYMCO from January, 1977 to early December, 1985, NYMCO's New York office would open a major letter of credit with its bank in Hong Kong. C-Art would deliver the bills of lading, commercial invoice, U.S. Customs Form 5515, and other relevant documents to its Hong Kong bank, which would negotiate them for value against NYMCO's letter of credit at NYMCO's bank. The original, endorsed bill of lading would then be sent to NYMCO in New York so that NYMCO could ultimately present it to HKIL in Long Beach and take delivery of the goods. This was a "letter of credit documentary transaction."

The documents were actually regularly delayed so NYMCO developed a system whereby HKIL delivered the goods to NYMCO in Long Beach without the original, negotiated bills of lading, against guarantees from NYMCO's bank. C-Art was aware of this system of delivery. By October, 1985, however, NYMCO began issuing its own corporate guarantees (on the same form as its bank's guarantees) in exchange for the goods, and C-Art claimed it was unaware of this change in practice.

This case only involves the situation from December 1985, to March, 1986.

By December, 1985, NYMCO had run out of funds and instructed C-Art not to draw on any of NYMCO's Hong Kong letters of credit. As a result, C-Art refrained from delivering any bills of lading (or other documents) to its bank but maintained possession of the original bills of lading itself. This was a major change: previously the bills and the payments had been escrowed between C-Art's bank and NYMCO's bank in what is commonly referred to as a "documentary transaction." But from December, 1985 C-Art chose to engage in unconditional F.O.B. sales contracts. One result of this decision was of major legal importance: *the bills were never deposited with any bank, were never used as collateral and were not negotiated.* This was laboriously and repeatedly established at trial.

Between December, 1985 and March, 1986, NYMCO purchased goods from C-Art on a straight "F.O.B. Hong Kong" basis. In that period, C-Art delivered goods worth approximately HK $1.8 million to NYMCO in Hong Kong. No letter of credit was opened by NYMCO for the purchase of the goods, nor did C-Art receive any payment from NYMCO for the goods. NYMCO behaved as an F.O.B. buyer and itself arranged and paid for the ocean freight, insurance, trucking expenses and U.S. customs duties in bringing the goods to the United States. HKIL, as the ocean carrier, issued bills of lading to C-Art for the goods whereby C-Art was the "shipper," the consignee was "to order of shipper," and NYMCO was the "notify party." Once the goods had arrived in California, NYMCO obtained the release of approximately twenty consignments from HKIL under the corporate guarantees, without surrendering the original bills.

NYMCO filed for bankruptcy protection under Chapter 11 on April 21, 1986, but C-Art apparently did not

find out about it until May 8, 1986. C-Art filed a bankruptcy claim on June 23, 1986 for $227,200 (the initial total value of the goods shipped by HKIL to NYMCO), but recovered no payment and so decided to pursue HKIL under its bills of lading. The first time HKIL had any notice C-Art claimed HKIL has wrongfully delivered the goods to NYMCO was in late July, 1986, from C-Art's bankruptcy lawyer.[4]

HKIL argued that NYMCO as the buyer of goods on F.O.B. Hong Kong terms was, as against C-Art, the party with the paramount title, and had at all times been entitled, as against C-Art, to receive the goods from HKIL.

The District Court held that each bill of lading constituted a contract between C-Art and HKIL, which by its terms required that the goods be delivered only "upon surrender of the original, properly endorsed bill of lading." As the goods were released without surrender of the bills, the delivery of the goods constituted a breach of contract between C-Art and HKIL, and C-Art was entitled to damages resulting from such breach in the amount of all sums remaining unpaid by NYMCO.

---

[4] HKIL also contended that C-Art had ratified the delivery by C-Art's full claim in NYMCO's bankruptcy: this was preserved before the Ninth Circuit, but was not addressed in the Court's opinion although the Circuit Court specifically mentioned the timing of the bankruptcy. The cases on point are *A.W. Burritt Co. v. New York C & H RR Co.*, 135 N.Y.S. 557 (1941); *Kesselman v. Mid-States Freight Lines*, 78 R.I. 518, 82 A.2d 881 (1951); *Midland Linseed Co. v. American Liquid Fumigator Co.* 183 Iowa 1046, 166 N.W. 573 (1968); *A.D. Blowers & Co. v. Canadian Pac. Ry. Co.*, 155 F. 935 (9th Cir. 1907).

This point is not raised for certiorari but as a further indication that the Ninth Circuit may not have given the entire case the full and careful attention which it generally provides.

The Ninth Circuit upheld the District Court's finding that HKIL was liable to C-Art for misdelivery of the goods. In a fundamental misunderstanding of the undisputed facts, it found that the bills had been delivered to C-Art's bank so that reliance was created as in a normal "documentary transaction." The Circuit opinion states that "C-Art attempted to exchange [each bill of lading] for value at NYMCO's Hong Kong bank" (940 F.2. at 533).[5] At all times at trial it was categorically stated by C-Art that the bills of lading had never been lodged with any bank for any purpose, and on the conclusion of trial C-Art was able to produce from its own files the original unendorsed bills. This was clearly addressed in both briefs and at oral argument, and detailed citation was provided to the seven instances in which Mr. Chan of C-Art had insisted at trial that he had not delivered any of the bills of lading here to his bank.

This error cannot be explained. It is simply a major error of fact created by the Circuit Court from its own misunderstanding of the facts. However the Court then built upon it by citing only to documentary transaction cases, and relying upon *Allied Chem. Int'l Corp. v. Cia. de Nav. Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985) in great detail for the principle that delivery of negotiable bills of lading to a bank as part of a documentary transaction created a reliance in the seller of the goods that payment on his underlying contract of sale was to be

---

5 The opinion addresses the facts as if only one bill of lading was at issue, and repeatedly and consistently discusses a "bill of lading" in the singular. This is a small instance of the Court's fundamental failure to come to grips with the facts of the case: there were some 20 bills of lading involved, spread over a period of three months, with cargoes received and delivered over a period of six months. The Ninth Circuit's opinion was not rigorously produced.

dependent upon the proper delivery of bills of lading against letter of credit proceeds.

Allied Chemical is an extremely well-written case which would have been entirely on point had the facts as stated by the Ninth Circuit ever existed in this case — but those facts never existed, and the Court was so told. A considerable and controlling area of the Ninth Circuit's opinion is based upon facts that simply did not exist.

The result of creating a set of nonexistent facts applicable to an illusory "documentary transaction" is that the Circuit did not consider the UCC rules and the precedent from this Court (addressed below) which hold that, as between an F.O.B. seller and an F.O.B. buyer, the buyer is entitled to receive his cargo without tendering the bills of lading so long as the bills have not been negotiated for value to a third party *bona fide* purchaser.

The Ninth Circuit accepted that the sale between C-Art and NYMCO was on F.O.B. Hong Kong terms. It specifically held that, because NYMCO had never paid C-Art for the goods, the bills of lading deposited with the bank created a "documentary transaction" and controlled the passage of title (but, of course, the bills were never so deposited with *any* bank). The Ninth Circuit thereby rejected HKIL's contention that NYMCO was entitled to delivery of the goods as paramount owner, and did so without addressing the relevant case and statute law on point.

Factually, the opinion is suppositious, and this Court should grant certiorari in order to summarily vacate it and remand with instructions to the Circuit to review the facts as to sale and title in accordance with traditional and accepted law. That law is set out below.

2. The Uniform Commercial Code and a Prior Decision of this Court Hold that Delivery to the F.O.B. Buyer is Valid against the Seller Without Surrender of the Bill of Lading.

In this case, C-Art sold goods directly to NYMCO on an "F.O.B. Hong Kong" basis. This was a simple sale of goods governed by the Uniform Commercial Code (the "UCC"). Section 2-401(2) of the UCC, which deals with the passing of title, provides:

> "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading."

This statute clearly applies to the present situation.

Title and risk of loss passed from C-Art to NYMCO upon delivery of the goods to HKIL in Hong Kong. Contrary to the Ninth Circuit's views, the issuance of a bill of lading does not change the situation: the statute expressly so provides — "title passes to the buyer . . . despite any reservation of a security interest by the bill of lading." As between C-Art and NYMCO, NYMCO owned the goods upon delivery in Hong Kong, even though it had not actually paid for them. This is agreed by all parties; indeed C-Art recognized the fact that title to the goods passed to NYMCO at the F.O.B. point in Hong Kong as it filed a claim in NYMCO's bankruptcy

action for 100% of the sale price. C-Art's claim in bankruptcy was for a *consummated* sale.

HKIL however had issued negotiable or order bills of lading to C-Art: C-Art was a bailor, HKIL was the bailee, and in the normal course of events a buyer of the bills for value would be entitled to rely on HKIL to keep the cargoes until it exchanged them for the bailment documents, the negotiated and endorsed bills. There is however one major exception to this rule; the actual owner of bailed cargo may at any time demand delivery, and the carrier has a defence against the bailor's action for wrongful delivery if it can show it delivered the goods to the holder of a title "paramount" to that of the bill of lading holder. This situation generally only arises where the bills have *not* been negotiated, as is the case here. The Ninth Circuit ignored this exception, and stated only the rule.

Section 7-403 of the UCC provides:

> "(1) The bailee must deliver the goods to a person entitled under the document . . . unless and to the extent that the bailee establishes any of the following:
>
> > (a) Delivery of the goods to a person whose receipt was rightful as against the claimant; . . ." [6]

---

[6] A similar permission exists under the Pomerene Bill of Lading Act: "A carrier is justified . . . in delivering goods to one who is (a) a person lawfully entitled to the possession of the goods." 49 U.S.C. § 89. The Pomerene Act also makes clear that it is ***negotiation*** of the bill, and not its issuance, which creates the strict liability upon which the Ninth Circuit erroneously relied:

> ". . . if a carrier delivers goods for which an order bill had been issued, . . . and fails to

(continued)

C-Art was the "person entitled under the document," while HKIL was the "bailee": the bills of lading were not negotiated to a good faith purchaser for value at any time, but remained in C-Art's possession. HKIL's defense was that NYMCO's title was paramount to C-Art's, and this is indisputable since all Courts have found that the terms of sale between C-Art and NYMCO were F.O.B. Hong Kong.

Delivery of the goods to NYMCO was therefore, in UCC 7-403 terms, "rightful as against the claimant" C-Art. *See* White and Sommers, *Handbook of the Law Under the Uniform Commercial Code*, Section 21-3, p. 852 (2d ed. 1980) (a carrier is excused from liability for misdelivery if it delivers to a party that has paramount title); Riegert and Braucher, *Documents of Title*, UCC Practice Handbook, Section 3.4.2 (1978):

> "... in an action for misdelivery brought by a person entitled under the document, Section 7-403(1)(a) gives the bailee a defense if he has delivered to the owner of a title paramount to that of the person claiming under the document ..."

(fn. continued)

> take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, ... and notwithstanding delivery was made to the person entitled thereto." 49 U.S.C. § 91.

Of course, C-Art did *not* sell its bills "for value and in good faith" to anyone, and the strict liability of this statute does not arise, despite the Ninth Circuit's contrary assertion.

The Ninth Circuit's decision to the contrary conflicts not only with the UCC, but also with a decision of this Court. In *Hentz v. The IDAHO*, 93 U.S. (23 Wall.) 575, 23 L.Ed. 978 (1877), a united Supreme Court confirmed the principle that a carrier may, as an excuse for non-delivery in violation of the terms of the bill of lading, show that he has delivered the goods to the true and paramount owner. The Court stated:

> "When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title."

93 U.S. at 580.

C-Art is, as respects a delivery by HKIL to C-Art's F.O.B. buyer NYMCO, a "bailor having no title" — yet has been permitted to recover damages for wrongful delivery to the owner of the cargo.

The IDAHO involved an action for alleged mis-delivery of goods under a bill of lading. There was in effect an F.O.B. sale of 165 bales of cotton by the shipper Forbes to a receiver, Porter & Co. In fact the shipper sold the goods twice, first to Porter under a bill of lading for one vessel, and then to Hentz under a bill of lading for the IDAHO. The carrier released the goods to Porter since he claimed "paramount title" — even though Porter did not have a bill of lading valid for the IDAHO. This Court held there was nothing for Forbes to convey after the first sale so that, with or without a bill of lading, Porter was entitled to delivery of the goods. It was accepted that delivery was not made in accordance with the IDAHO's bill of lading, but delivery

was justified because Porter as the true owner of the goods "had a right superior to that of the shipper to control its delivery." 93 U.S. at 579.

Hentz v. The IDAHO states a well-received rule:

> ". . . (I)t is now the uniform rule that a bailee is relieved of all liability to the bailor if he proves that . . . he has delivered the goods to a third party claimant and that such third-party is indeed the one rightfully entitled to them."

Messerall v. Fulwider, 199 Cal.App.3d 1324, 245 Cal.Rptr. 548, 552 (1988).

The rule in *The IDAHO* applies to and controls this case. The F.O.B. sale from C-Art to NYMCO in Hong Kong passed title in the goods to NYMCO, which was thereby entitled to possession as against C-Art. Accordingly, HKIL's delivery to NYMCO was proper; it did not matter that delivery was made to NYMCO without presentment of the (non-negotiated) bills of lading held by C-Art.

CONCLUSION

This Court should grant certiorari to resolve the dispute between circuits as to the effect of illegality on the enforceability of contracts.

Alternatively the Court should grant certiorari in order to summarily reverse with instructions to the Ninth Circuit to consider the application of the rule of *Hentz v. The IDAHO* to the facts.

DATED: February 28, 1992,

Respectfully submitted,

DAVID E. R. WOOLLEY
Counsel of Record

WILLIAMS WOOLLEY COGSWELL
NAKAZAWA & RUSSELL

Attorneys for Petitioner
Hong Kong Islands Line America, S.A.,
a corporation

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Court of Appeal-Second Dist.
FILED
DEC 6 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

C-ART, LTD.,
Plaintiff-Appellee,
vs.
HONG KONG ISLANDS LINE AMERICA, S.A.,
Defendant-Appellant
and
PRECIOUS SHIPPING COMPANY, S.A.; HONG KONG TREASURE SHIPPING COMPANY, S.A.; NEW PIONEER SHIPPING COMPANY, S.A.; HONG KONG AMERICA SHIPPING COMPANY, S.A., et al.,
Defendants.

No. 89-56090
D.C. No. CV-88-2094-RB

ORDER

Appeal from the United States District Court
for the Central District of California

Before: HUG, CANBY, and WIGGINS, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

C-ART, LTD.,
Plaintiff-Appellee,

v.

HONG KONG ISLANDS LINE AMERICA, S.A.,
Defendant-Appellant,

and

PRECIOUS SHIPPING COMPANY, S.A.; HONG KONG TREASURE SHIPPING COMPANY, S.A.; NEW PIONEER SHIPPING COMPANY, S.A.; HONG KONG AMERICA SHIPPING COMPANY, S.A., et al.,
Defendants.

No. 89-56090
D.C. No. CV-88-2094-RB
OPINION

Appeal from the United States District Court
for the Central District of California
Robert C. Bonner, District Judge, Presiding

Argued and Submitted
November 9, 1990—Pasadena, California

Filed August 5, 1991

Before: Procter Hug, Jr., William C. Canby, Jr. and Charles Wiggins, Circuit Judges.

Opinion by Judge Hug

SUMMARY

Sales and Negotiable Instruments

Affirming a district court judgment, the court of appeals held that delivery of goods without the appropriate bill of lading, on the mere reliance of an importer's corporate guaranty, subjected an ocean carrier to liability to the exporter for the misdelivery of goods.

C-ART, Ltd., contracted with the New York Merchandising Company (NYMCO) for the purchase of goods from manufacturers in Hong Kong. The goods were shipped by appellant Hong Kong Islands Line America, S. A., an ocean carrier, from Hong Kong to California. Under the express terms of the bill of lading, NYMCO would ultimately receive the original bills of lading in exchange for its proper payment to C-ART for the goods. NYMCO would then present these bills of lading to HKIL upon the arrival of its ship in California to take possession of the goods. However, under the parties' prior course of dealing in this case, rather than waiting to receive the bills of lading to release the goods, HKIL would instead release the goods upon NYMCO's presentment of a "bank guarantee," that in effect would absolve HKIL of liability for any claim of misdelivery of the goods without a properly endorsed original bill of lading. The shipments at issue here, however, were released upon the presentment of a mere NYMCO's "corporate guarantee" containing no security guarantee from a bank. C-ART filed suit against HKIL for misdelivery of the goods without a properly endorsed bill of lading after unsuccessfully attempting to recover payment from then bankrupt NYMCO. The district court ruled for C-ART.

[1] The court agreed with other circuits that have held that bills of lading constitute "contracts of carriage" between a shipper and carrier and, as contracts of adhesion, are strictly

construed against the carrier. Thus, if the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery, resulting in a prima facie conversion of the goods and a breach of contract. **[2]** In this case, it was undisputed that the terms of the bill of lading required HKIL to obtain from NYMCO the original, properly endorsed bill of lading prior to delivery of the goods. It was also undisputed that HKIL delivered the goods without the bill of lading, instead relying on NYMCO's corporate guaranty. Therefore, HKIL was liable to C-ART for its misdelivery of the goods.

[3] There was no question that but for NYMCO's insolvency, the bill of lading would have been negotiable. Thus, there was no merit to HKIL's argument that the bill of lading should not be given its intended effect because NYMCO was insolvent at the time it was presented to the bank. Here, an insolvent buyer was given possession of goods for which it had not paid, creating a dispute that is precisely the consequence that the documentary transaction is intended to avert. **[4]** In addition, the district court found that C-ART shipped the goods to NYMCO as an independent seller, rather than in a capacity as NYMCO's buying agent. The court concluded this finding was not clearly erroneous. **[5]** HKIL failed to present any evidence in support of its agency theory that would indicate that C-ART's method of purchasing goods from the Hong Kong manufacturers was in any way subject to NYMCO's control. **[6]** HKIL similarly failed to point to any evidence characteristic of another essential element of an agency relationship; that C-ART possessed the capacity to bind NYMCO to the transactions made with the Hong Kong manufacturers.

[7] The court recognized that the parties' own characterization of the relationship is not necessarily dispositive. The actual dealings and course of conduct between the parties is also to be considered. **[8]** Here the district court had properly found that the "buying commissions" indicated on these docu-

ments were actually an accommodation on the part of C-ART to allow NYMCO to avoid paying customs duties on that portion of the total purchase price designated as C-ART's "commissions." These findings were well supported by the evidence. [9] Accordingly, C-ART, as shipper of the goods, had a personal stake in the outcome of the case and therefore standing to bring suit against HKIL for misdelivery of the goods, and was the real party in interest.

COUNSEL

David E. R. Woolley, Williams, Woolley, Cogswell, Nakazawa & Russell, Long Beach, California, for the defendant-appellant.

Jerry S. Phillips, Friedman & Phillips, Los Angeles, California, for the plaintiff-appellee.

OPINION

HUG, Circuit Judge:

I.

This case involves a shipment of goods by an ocean carrier from Hong Kong to California. C-ART, Ltd. ("C-ART"), an exporter of goods based in Hong Kong, had a contract with the New York Merchandising Company ("NYMCO"), a New York importing company, for the purchase of goods from manufacturers in Hong Kong. The goods were shipped by Hong Kong Islands Line America, S.A. ("HKIL"), an ocean carrier, from Hong Kong to California.

Between January and March 1986, C-ART purchased goods from various Hong Kong manufacturers and arranged

for their shipment to NYMCO in California. Upon delivery of each shipment of goods to HKIL in Hong Kong, HKIL issued to C-ART a bill of lading[1] which C-ART would in turn present to a bank to exchange for payment from NYMCO. Under the scenario contemplated by the express terms of the bill of lading, NYMCO would ultimately receive the original bills of lading in exchange for its proper payment to C-ART for the goods. NYMCO would then present these bills of lading to HKIL upon the arrival of its ship in California in order to take possession of the goods.

Under the parties' prior course of dealing in this case, however, rather than waiting to receive the bills of lading to release the goods, HKIL would instead release the goods upon NYMCO's presentment of a "bank guarantee," which in effect would absolve HKIL of liability for any claim of misdelivery of the goods without a properly endorsed original bill of lading. The shipments at issue here, however, were released by HKIL to NYMCO upon the presentment of a mere NYMCO "corporate guarantee," which contained no security guarantee from a bank.

Shortly after HKIL's release of the goods to NYMCO based solely on the corporate guarantee but before C-ART had been paid, NYMCO filed for bankruptcy under Chapter 11 of the Bankruptcy Code. After unsuccessfully attempting to recover payment for the goods from NYMCO, C-ART filed the present suit against HKIL for misdelivery of the goods without a properly endorsed bill of lading. The district court ruled in favor of C-ART and entered judgment for $185,997.65. HKIL appeals and we affirm.

---

[1]A "bill of lading" constitutes a "receipt for goods, contract for their carriage, and is documentary evidence of title to goods." *Black's Law Dictionary* (5th ed. 1979) at 152.

II.

This case requires us to determine whether HKIL, the ocean carrier, misdelivered goods shipped by C-ART in Hong Kong to NYMCO, an importer in California. Thus, as a "shipment of goods by sea [it] is the sort of traditional maritime activity which falls squarely within the district court's admiralty jurisdiction." *Genetics Int'l v. Cormorant Bulk Carriers, Inc.*, 877 F.2d 806, 808 (9th Cir. 1989) (citing 1 *Benedict on Admiralty*, §§ 181, 182, p.12-4 (7th ed. 1989)) (other citation omitted); 28 U.S.C. § 1333(1) (1988). As a result, this court applies substantive rules of maritime law. *Genetics*, 877 F.2d at 808.

III.

C-ART claims it is entitled to recovery because HKIL's misdelivery of the goods constitutes a breach of a contract between C-ART and HKIL for shipment of the goods. Specifically, C-ART's argument is premised on HKIL's issuance of a bill of lading to C-ART upon C-ART's delivery of the goods to HKIL's vessel. The bill of lading issued by HKIL designated goods as consigned "to order of shipper" and its express terms required the goods to only be delivered "upon surrender of the original, properly endorsed bill of lading."

A.

[1] We agree with other circuits that have held that bills of lading constitute "contracts of carriage" between a shipper and carrier and, as contracts of adhesion, are "strictly construed against the carrier." *Interocean S.S. Corp. v. New Orleans Cold Storage and Warehouse Co., Ltd.*, 865 F.2d 699, 703 (5th Cir. 1989); *Allied Chem. Int'l Corp. v. Companhia De Navegacao Lloyd Brasileiro*, 775 F.2d 476, 482 (2d Cir. 1985) (citing *The Caledonia*, 157 U.S. 124, 137 (1895); *West India Indus. v. Tradex*, 664 F.2d 946, 951 n.9 (5th Cir. 1981); *Mitsui & Co. v. American Export Lines*, 636 F.2d 807, 822-23

(2d Cir. 1981); *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931) (L.Hand, J.)), *cert. denied*, 475 U.S. 1099 (1986). "Absent a valid agreement to the contrary, the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading." *Allied*, 775 F.2d at 481. " 'Delivery to the consignee named in the bill of lading does not suffice to discharge the [carrier] where the consignee does not hold the bill of lading.' " *Id.* (quoting 2 T.G. Carver, *Carriage by Sea* ¶ 1593 (R. Colinvaux 13th ed. 1982)). Thus, "[i]f the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery," resulting in a "prima facie . . . conversion of the goods and a breach of contract." *Id.* at 481-82 (citations omitted).

[2] In this case, it is undisputed that the terms of the bill of lading required HKIL to obtain from NYMCO the original, properly endorsed bill of lading prior to delivery of the goods. It is also undisputed that HKIL delivered the goods without the bill of lading, instead relying on NYMCO's corporate guaranty. We therefore conclude that HKIL is liable to C-ART for its misdelivery of the goods.[2]

---

[2]We also conclude that HKIL is liable for misdelivering the goods in its capacity as a bailee. The Second Circuit has held that "a bailee is absolutely liable for misdelivering cargo, unless his mistake as to the person entitled to receive the goods was induced by the bailor or the contract of carriage [i.e., the bill of lading] otherwise reduced or eliminated his liability." *Allied*, 775 F.2d at 483 (citation omitted). Here, there is no contention or evidence that C-ART induced the misdelivery or that the bill of lading curtailed HKIL's liability. The Second Circuit justifies application of this rule to maritime transactions based on considerations of uniformity and certainty, and because the rule represents "a sound allocation of responsibility for the bailee is in a better position than the bailor to establish procedures to minimize the risk of misdeliveries and to insure against the few misdeliveries that will inevitably occur despite the most careful precautions." *David Crystal, Inc. v. Cunard S.S. Co., Ltd.*, 339 F.2d 295, 298 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965).

B.

In its defense, HKIL argues that misdelivery could not have occurred because NYMCO had title to the goods from the time the goods were delivered to the ship in Hong Kong and therefore had the exclusive and immediate right to possession of the goods upon arrival of the ship in California. This argument is inimical to the express provisions of the bill of lading, as well as contradictory to the applicable authorities. *See Allied*, 775 F.2d at 481 (possession of original bill of lading entitles buyer to possession of goods and *conveys title*); *Black's Law Dictionary* (5th ed. 1979) at 152 (bill of lading constitutes documentary evidence of *title* to goods). Although the goods were shipped "F.O.B. Hong Kong," with NYMCO consequently bearing the risk of loss from the time the goods were delivered to HKIL's ship in Hong Kong, it is undisputed that NYMCO never paid C-ART for the goods. In this case, therefore, the bill of lading controls.

[3] HKIL also argues that *Allied* and *Interocean* are distinguishable because the bill of lading used in this case was not negotiable at the time C-ART attempted to exchange it for value at NYMCO's Hong Kong bank. There is no question, however, that but for NYMCO's insolvency, the bill of lading would have been negotiable. Prior to NYMCO's insolvency, undisputed evidence showed that it was C-ART's normal practice to exchange the bill of lading for dollar value against NYMCO's letter of credit at its Hong Kong bank. There is no merit, therefore, to HKIL's argument that the bill of lading should not be given its intended effect because NYMCO was insolvent at the time it was presented to the bank. On the contrary, upholding this argument would encourage the type of misdelivery during a buyer's insolvency that the bill of lading and its underlying policy considerations are designed to protect. *See Allied*, 775 F.2d at 481 (shipping documents, including bill of lading, "enable[ ] the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of

the goods until he has paid for them"). Instead, we conclude that here, as in *Allied*, "an insolvent buyer . . . was given possession of goods for which it had not paid," creating a dispute that is "precisely the consequence that the documentary transaction is intended to avert. *Id.* at 482.

[4] Finally, HKIL contends that the agreement between NYMCO and C-ART involved a principal/agency rather than a purchaser/seller relationship. According to HKIL, therefore, C-ART, as NYMCO's buying agent, lacks standing to sue HKIL for its misdelivery of the goods, or, alternatively, is not the real party in interest. We are not persuaded. The district court found that C-ART shipped the goods to NYMCO as an independent seller, rather than in a capacity as NYMCO's buying agent. We conclude that this finding was not clearly erroneous. *See Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 822 (9th Cir. 1988).

[5] Max Fradkin, the then vice-president of NYMCO, testified that NYMCO never dealt directly with any of the manufacturers, did not know the price C-ART paid its manufacturers when NYMCO placed its purchase order with C-ART, and did not know what profit C-ART was making on the goods. Lionel Chan, C-ART's managing director, testified that he never advised NYMCO of the price C-ART was paying the manufacturers. According to Fradkin, NYMCO never agreed to pay the manufacturers directly but were instead only obligated to pay C-ART for the goods. Thus, the evidence supports the conclusion that only C-ART dealt directly with manufacturers who were both chosen and paid by C-ART. In sum, HKIL has failed to point to any evidence in support of its agency theory that would indicate that C-ART's method of purchasing goods from the Hong Kong manufacturers was in any way subject to NYMCO's control. *See Nelson v. Serwold*, 687 F.2d 278, 282 (9th Cir. 1982) (noting that the basic characteristic of an agent is one who "acts for or on behalf of the principal and subject to his control").

[6] HKIL has similarly failed to point to any evidence characteristic of another essential element of an agency relationship; that C-ART possessed the capacity to bind NYMCO to the transactions made with the Hong Kong manufacturers. *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1386 (9th Cir. 1984). There is no evidence that NYMCO had any independent relationship with the Hong Kong manufacturers. Instead, the evidence showed that its dealings were solely with C-ART. Finally, there is no evidence that the manufacturers considered NYMCO, rather than C-ART, to be the ultimate purchaser of the goods.

The only meaningful support for HKIL's agency theory involves various documents used in the shipping process that indicate that C-ART contracted to act as NYMCO's buying agent in Hong Kong in return for a buying commission. C-ART does not dispute that these documents, most notably the original C-ART/NYMCO agreement, indicate a principal-agent relationship. For example, the January 10, 1977 "Buying Agency Agreement" letter states that NYMCO "hereby appoints C.ART Ltd. as a Buying Agent in Hong Kong," and that "C.ART Ltd. will be entitled to a buying commission of up to 8% . . . . " The agreement is then signed by a vice-president of NYMCO and a representative of C-ART. HKIL also relies on United States Customs Service document ("Customs Form 5515"), along with C-ART "Commission Invoices," that expressly include a "buying commission" for goods shipped from Hong Kong as part of NYMCO's total Hong Kong purchase price.

[7] It is well established, however, that the parties' own characterization of the relationship is not necessarily dispositive. *See Nelson*, 687 F.2d at 282. The actual dealings and course of conduct between the parties is also to be considered. *See Whisper Soft*, 754 F.2d at 1386; *see also Pan Am. World Airways v. Shulman Transp. Enter., Inc. (In re Shulman Transp. Enter., Inc.)*, 744 F.2d 293, 295 (2d Cir. 1984) ("A debtor does not become the agent of his creditor simply

because he is called an agent.") (citing *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 354 (1922)).

[8] Here, the district court found that the "buying commissions" indicated on these documents were actually an accommodation on the part of C-ART to allow NYMCO to avoid paying customs duties on that portion of the total purchase price designated as C-ART's "commissions."[3] The district court further found that the amount of these commissions did not necessarily have any correlation to C-ART's actual markup or profits on its sale of the goods to NYMCO. We conclude that these findings are well supported by the evidence presented at trial and therefore agree with the decision of the district court.[4]

[9] Accordingly, C-ART, as shipper of the goods, has a "personal stake" in the outcome of the case and therefore standing to bring suit against HKIL for misdelivery of the goods, and is the real party in interest under Fed. R. Civ. P. 17(a). *See generally EMI, Ltd. v. Bennett*, 738 F.2d 994, 996 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

IV.

The district court's judgment in favor of C-ART is **AFFIRMED.**

---

[3]Selling commissions incurred by buyers with respect to imported merchandise are not subject to customs duties. *See* 19 U.S.C. § 1401a(b)(1)(B) (1988).

[4]In upholding the district court's findings that the non-existent "commission" arrangement was actually a ruse to avoid payment of customs duties, we certainly do not condone what appears to be an admitted disregard of United States Customs laws. Any such violation is a matter for consideration by federal agencies and not a matter to be resolved in this appeal.

APPENDIX C

David E. R. Woolley
Williams Woolley Cogswell Nakazawa & Russell
200 Oceangate, Suite 700
Long Beach, California 90802
Telephone: (213) 495-6000
Attorneys for All Defendants

FILED
AUG 25 1989
Clerk, U.S. District Court
Central District of California
By _____ Deputy

ENTERED
Clerk, U.S. District Court
AUG 28 1989
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

C-ART, LTD.,
Plaintiff

vs.

HONG KONG ISLANDS LINE AMERICA, PRECIOUS SHIPPING COMPANY S.A., HONG KONG TREASURE SHIPPING COMPANY S.A., NEW PIONEER SHIPPING COMPANY S.A., HONG KONG AMERICA SHIPPING COMPANY, S.A., HONG KONG HORIZON SHIPPING COMPANY, S.A., HONG KONG ADMIRAL SHIPPING COMPANY S.A., HONG KONG AUSTRALIA SHIPPING COMPANY, S.A.
Defendants.

No. CV-88-2094 RB (Gx)
JUDGMENT

This cause having come on regularly for trial on July 19, 1989, and continuing on July 20, 21 and 25, 1989, before the Honorable Robert C. Bonner, United States District Judge, sitting without a jury; plaintiff appearing by its attorneys, Freidman and Phillips, by Jerry S. Phillips, and Charles N. Maybruck, and defendants appearing by their attorneys, Williams Woolley Cogswell Nakazawa & Russell, by David E. R. Woolley; evidence, both oral and documentary, having been introduced, and both parties having argued the cause, the Court having considered such evidence and argument as well as the stipulations of the parties and ten Pre-Trial Order filed herein; upon proof being made to the satisfaction of the Court, and good cause appearing therefor,

IT IS HEREBY ADJUDGED AND DECREED that plaintiff C-ART, LTD. shall recover judgment against defendant HONG KONG ISLANDS LINE AMERICA, S.A., in the amount of $185,997.65, together with interest thereon at the rate of 7.22 % per annum from July 26, 1986, plus costs in the amount of $_____.

DATED: 8-25-89, 1989

ROBERT C. BONNER
ROBERT C. BONNER
United States District Judge

SUBMITTED BY:

David E. R. Woolley
Williams Woolley Cogswell
Nakazawa & Russell

/s/ David E. R. Woolley
David E. R. Woolley
Attorneys for All Defendants

This constitutes notice of entry
as required by FRCP, Rule 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 25 1989
Clerk, U.S. District Court
Central District of California
By _____ Deputy

C-ART, LTD.,
Plaintiff

vs.

HONG KONG ISLANDS LINE AMERICA, PRECIOUS SHIPPING COMPANY S.A., HONG KONG TREASURE SHIPPING COMPANY S.A., NEW PIONEER SHIPPING COMPANY S.A., HONG KONG AMERICA SHIPPING COMPANY, S.A., HONG KONG HORIZON SHIPPING COMPANY, S.A., HONG KONG ADMIRAL SHIPPING COMPANY S.A., HONG KONG AUSTRALIA SHIPPING COMPANY, S.A.
Defendants.

No. CV-88-2094 RB (Gx)

ORDER RE JUDGMENT

The Court, having reviewed and considered the proposed Judgments and proposed Findings of Fact and Conclusions of Law lodged by both sides, as well as defendants' objections to plaintiff's proposed findings and conclusions, and the parties' memoranda regarding interest filed by the parties, order as follows:

1. Interest on the judgment will run from July 26, 1986 at the rate of 7.22%.

2. The plaintiff failed to carry its burden of proof with respect to all defendants, except for defendant Hong Kong Islands Line America, S.A. ("HKIL"). Therefore, judgment will be entered only against HKIL.

3. The Court has signed the proposed form of Judgment lodged by defendants, specifying interest at the rate of 7.22% per annum from July 26, 1986. The Court's deputy clerk is directed to enter the Judgment.

4. The Court declines to adopt either side's proposed Findings of Fact and Conclusions of Law. Rather, the Court's oral recitations on July 25, 1989 at the conclusion of the trial will serve as the Court's Findings of Fact and Conclusions of Law.

5. Counsel for the plaintiff is ordered to obtain a certified copy of a reporter's transcript of the Court's oral recitations on July 25, 1989 and forthwith file same with a captioned cover page entitled: "Findings of Facts and Conclusions of Law."

IT IS SO ORDERED.

Dated: 8-25-89

/s/ ROBERT C. BONNER
ROBERT C. BONNER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT C. BONNER,
DISTRICT JUDGE PRESIDING

C-ART, LTD.,

PLAINTIFF,

VS.

HONG KONG ISLANDS
LINE AMERICA, ET AL.,

DEFENDANTS.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

RULING OF THE COURT, ONLY

LOS ANGELES, CALIFORNIA

TUESDAY, JULY 25, 1989

SUSAN A. LEE, CSR 2800, CM, RPR
OFFICIAL COURT REPORTER
435 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-6353

APPEARANCES:

FOR THE PLAINTIFF:

FRIEDMAN & PHILLIPS
BY: JERRY S. PHILLIPS, ESQ.
10920 WILSHIRE BOULEVARD, STE. 650
LOS ANGELES, CALIFORNIA 90024-6508
(213) 208-2899

FOR THE DEFENDANTS:

WILLIAMS, WOOLLEY, COGSWELL
NAKAZAWA & RUSSELL
BY: DAVID E. R. WOOLLEY, ESQ.
200 OCEANGATE, STE. 700
LONG BEACH, CALIFORNIA 90802
(310) 495-6000

INDEX: C-ART V. H.K.I.L. PARTIAL TRANSCRIPT

	PG	LN
LOS ANGELES + CALIFORNIA,	4	1
TUESDAY, JULY 25, 1989 + 2:00 P.M. SESSION	4	2
RULING + THE COURT: OVER	4	4

RULING OF THE COURT

LOS ANGELES + CALIFORNIA,
TUESDAY, JULY 25, 1989

+ 2:00 P.M. SESSION

(PARTIAL TRANSCRIPT:)

RULING +

The Court: Over the lunch break, I had a chance to give some thought to this case; so I think I'm going to take an opportunity now to outline the court's view of the case.

First of all, I'm wondering, do we have that blowup of Exhibit 25, or is that no longer with us in this courtroom?

Mr. Phillips: It's gone, your Honor.

The Court: All right. First of all, the court finds — and I don't think it's disputed — that the goods were shipped under the invoices, and the various bills of lading that were set forth then are set forth on Exhibit 25, and that those goods have not been paid for with the exception of — I believe it's goods that are involved in two of the bills of lading. And I don't have those numbers here, but I think that, from the record, you —

Mr. Phillips: Your Honor, excuse me. I think it's one bill of lading and two invoices.

The Court: Two invoices. Yes. Could you give me the two invoices that were paid?

Mr. Phillips: 85-871, 85-872.

Mr. Woolley: And I believe the bill of lading is LGB 051 DBU 856.

The Court: That is incredible, Mr. Woolley, if it's right. I'm not going to check it. But since I have the

invoice numbers, let me say that the court finds that the goods, except for the invoices 85-871 and 85-872, have not been paid for.

C-Art claims to have purchased the goods at issue from manufacturers or suppliers in Hong Kong and then in essence resold them to NYMCO.

The defendants on the other hand claimed that C-Art was a mere buying agent of NYMCO and therefore not a real party in interest in this case and, in essence, that C-Art lacks standing to sue or, to the extent that C-Art has standing to sue, its damages should be limited to the loss of the "commissions"; and I'll put "commissions" in quotes right now.

Defendants and defendants' counsel pointed to the 1987 agreement between NYMCO and C-Art, which is Exhibit 71, as well as the special Customs invoices, the cop's or confirmation of purchases, as well as other documents relating to the specific shipment of goods, and points to those documents as evidencing a relationship between C-Art and NYMCO as one of a buying agent to principal.

On the other hand, Mr. Chan, the principal of the plaintiff, has testified that his company, C-Art, paid for the goods, shipped them by order of bill of lading rather than something designating NYMCO as the designated consignee; these were order bills. And in addition to a sum of money designated as a "commission" — and I put that in quotes — on certain of the documents, C-Art added a markup over the price it paid to its suppliers.

And indeed I think from the evidence, at least from Mr. Chan, the amount designated as "commissions" on these various documents appears to bear very little or perhaps no correlation to the amount of gross profits that Mr. Chan or C-Art generated from these sales. By that, I mean the gross sales price to NYMCO less the actual cost of goods to C-Art.

Further, the former Los Angeles manager of NYMCO, Mr. Fradkin, testified, as did Mr. Chan, that the 1987 letter agreement was in substance an accommodation to NYMCO for Customs purposes or so that it could take advantage of certain Customs regulations and, I say here, presumably to argue that the transactions could be characterized in a certain way for Customs purposes.

Mr. Fradkin himself testified that he understood that the commissions figure did not necessarily have any correlation whatsoever with C-Art's actual markup or profits on the sales by C-Art to NYMCO.

It appears from the evidence in this case that C-Art did pay the manufacturers, and Mr. Fradkin also testified in substance that NYMCO had no agreement with these manufacturers and did not itself pay at least these manufacturers. He might have indicated that there were other situations that existed in perhaps Hong Kong or other countries in the world in which NYMCO directly paid manufacturers. But in any event, clearly with respect to the manufacturers that sold the goods in question here, Mr. Fradkin testified that NYMCO did not pay those manufacturers.

All of this is consistent with C-Art as an owner and seller of the goods to NYMCO. In addition, if NYMCO was in fact buying from C-Art's suppliers, one would expect that NYMCO would have paid the suppliers for the goods and set up letters of credit not in favor of C-Art, but in favor of these suppliers.

Lastly, the question of characterizing the relationship between C-Art and NYMCO turns upon — and here I certainly agree with Mr. Woolley: it turns upon an assessment of the credibly [sic?] of Mr. Chan and, for that matter, Mr. Fradkin with respect to their testimony with respect to the characterization of the relationship between C-Art and NYMCO.

I've given this matter a lot of thought, because there are some documents that Mr. Woolley has pointed to that appear, certainly on their face, to be inconsistent with the testimony of both of those gentlemen on this subject matter. However, the court finds the testimony of both Mr. Chan and Mr. Fradkin regarding the nature of the actual relationship to be both plausible and credible.

Hence, I find that C-Art was the owner and seller of the goods at issue and not a mere buying agent of NYMCO. It follows, I think, from that, as a matter of law, that C-Art is the real party in interest; that it has standing to sue for breach of the bills of lading or the contract for improper release of the goods; and its damages for losses are not limited to the so-called "commissions."

The bills of lading, of course, in this case constitute the contract between the parties, between C-Art as shipper and the defendant Hong Kong Islands Line as the carrier. The contracts themselves require that the goods could not be released unless the defendants were presented with an original bill of lading, unless the carrier was presented with an original endorsed bill of lading.

All of the goods at issue — and I don't believe this is in any dispute — were released by Hong Kong Islands Line to NYMCO without presentment or surrender of bills of lading. The contract was breached and the plaintiff is entitled to damages for loss resulting from the breach unless defendants otherwise have a defense to liability.

In this regard, at least a couple of separate affirmative defenses to liability have been raised by and on behalf of the defendants. The first one I think could be characterized as the consent and/or ratification contentions of the defendants, whereby it's contended that plaintiff consented and/or ratified the release of the goods to NYMCO without presentment of bills of lading.

For some point in time up until October of 1985, NYMCO was able to obtain release, at least when the receipt of bills of lading was delayed. And the bills of lading here, in all instances — not just in the bills of lading at issue in this trial, but other bills of lading that reflected shipments of goods — prior to the early part of 1986, were apparently routed from Hong Kong to New York and then to Los Angeles.

But in any event, up until October of 85, NYMCO did have a practice of obtaining release, when it didn't have original bills, by giving Hong Kong Islands Line a bank guarantee, a guarantee of the Union Bank, that in essence it, the Bank, would hold harmless and indemnify the H.K.I.L. or, at least, the Bank would guarantee NYMCO's obligation in that regard; that H.K.I.L., or Hong Kong Islands Line, would be held harmless from any claim based upon an improvident or improper release of the goods being shipped.

It's not at all clear from the evidence, by the way, that the plaintiff was aware of this practice; and by "this practice," I mean the practice of release of goods by the carrier against a bank guarantee. Be that as it may, owing, I think the reasonable inference would be, to perhaps incipient financial difficulties after October 1985, the practice whereby NYMCO obtained release did change and it changed in a substantial and significant way.

To obtain release after October 85, where NYMCO did not have an original bill, or had some delay in getting it — in any event, they did not have an original bill of lading — NYMCO provided only a corporate guarantee to Hong Kong Islands Line. Although the forum used was still denominated a "bank guarantee," there simply wasn't any bank certification standing behind the guarantee, and it was signed only by NYMCO; so the only entity standing behind that

guarantee after October of 85, those guarantees, was NYMCO itself.

Hong Kong Islands Line released the goods. Indeed, it released the goods in question based only upon NYMCO's corporate guarantee. In so doing, I conclude that it assumed the risk that NYMCO would not pay for the goods, it assumed the risk that NYMCO would not or had not paid for the goods, and that Hong Kong Islands Line looked to NYMCO in the event that the shipper or some other party claimed a loss for improper release.

In short, the court concludes that Hong Kong Islands Line released the goods in question at its peril. There certainly, by the way, was no actual consent. The evidence does not even begin to suggest any actual consent to this practice on the part of C-Art in this case.

The defendants have cited *Ridgeway v. The Pennsylvania Railroad*, a 1915 Pennsylvania Supreme Court case, and some other cases; and I don't see that these cases are of any avail, first, as I read them to show a regular course of business, such that one can infer consent on the part of the shipper to a release under circumstances other than by presentment of a bill of lading.

The shipper, as a threshold matter, of course, must be shown to be aware of the practice. Based upon the evidence before me, including not just Mr. Chan's testimony but Mr. Fradkin's testimony, I find that C-Art was not aware of this practice, nor did it consent to the practice — which is really what's at issue here - at any time prior to the release of the last shipment in question.

Parenthetically, I might note — and I believe this has been stipulated to by the parties — that all of the goods at issue here had been released, I believe, prior to the end of March 1986. In any event, it was prior to the filing of bankruptcy by NYMCO on April 21, 1986.

Mr. Fradkin, for example, testified that he never informed C-Art of this practice, being the practice of

obtaining release of any cargo by bank or corporate guarantee; that he never informed Mr. Chan of that or, for that matter, he never informed anybody else employed by C-Art of that particular practice.

Further, although C-Art did attempt to collect from NYMCO, there's no question from the evidence that it did make efforts through initially rather strong efforts to get NYMCO to either fund existing letters of credit, increase the funds in existing letters of credit, open up or establish new letters of credit. There was a considerable — at least several telexes or faxes indicating that there was a serious effort to get NYMCO to do that.

And it also made efforts after that to attempt to collect from NYMCO, including, among other things, filing a claim or proof of loss in the bankruptcy proceedings involving NYMCO back in New York.

There are some state cases that have been cited by the defendants that bear, at least to some extent, on the issue of whether or not those actions would constitute ratification of the practice of Hong Kong Islands Line of releasing to NYMCO without surrender of a properly endorsed bill of lading.

I conclude, first of all, that there is a real question as to at what point in time C-Art had knowledge, as opposed to perhaps some suspicion, that goods had actually been released, period, much less released in accordance with some practice in which a corporate guarantee had been given to Hong Kong Islands Line.

But in any event, even if one did find that there was in inking or some level of knowledge on the part of C-Art, I simply cannot find these acts to constitute a knowledgeable ratification by C-Art of the practice of releasing the goods in violation of the terms of the bills of lading and under circumstances in which there was no presentment or surrender of the original bill in order to obtain release of the goods by NYMCO.

Frankly, I think to conclude that those acts, which basically are acts in which C-Art is attempting to collect all or at least partial payment for an indebtedness owed to it by NYMCO, to hold that that's ratification would be certainly, at a minimum, inconsistent with C-Art's duty to mitigate its damages vis-a-vis Hong Kong Islands Line.

There has been an affirmative defense raised as to liability based upon the equitable doctrine of laches. Although that has been argued extensively at least this morning — it's certainly been briefed by the parties — suffice it to say that it appears that not only — in fact, it not only appears, I think the court can find that NYMCO filed for bankruptcy on April 21st, 1986, and that virtually all the goods at issue had already arrived onboard vessel and had been offloaded either at the Port of Long Beach or the Port of San Diego prior to the filing of bankruptcy.

In fact, as I've just indicated, I believe the evidence by stipulation would indicate that by the end of March all of the goods had been offloaded and had been released by Hong Kong Islands Line to NYMCO. The plaintiff, C-Art, notified Hong Kong Islands Line of its claim, based upon the bills of lading, for the improper release of these goods in July of 1986.

First of all, with respect to a laches defense, the defendant of course has the burden of proof. I can't say that the delay in notifying Hong Kong Islands Line here was an unreasonable one.

Moreover, I think, given the fact that there was a bankruptcy fling on April 21, 1986, I'm not sure — in fact, I can't see any prejudice resulted to the defendants. Indeed, at least, I see no prejudice in any delay that may have occurred after the last release of the cargo; and certainly I can't see any prejudice that could have resulted to the defendants after the bankruptcy filing of April 21, 1986, by NYMCO.

Clearly a delay through the end of March, indeed perhaps even into April, where the plaintiff was still pressing NYMCO to either fund a letter of credit or to pay for goods shipped, a delay for that period of time I find was not unreasonable.

The only evidence that the plaintiff knew or may have known that NYMCO obtained release of the goods without the bill of lading, without presentment or surrender of a bill of lading, that I can think of right now is Exhibit 142, which is the fax or telex from C-Art to NYMCO dated April 17, 1989, just a few days about the bankruptcy was filed by NYMCO.

In Exhibit 142 the plaintiff states, among other things, "I'm sure you delivered our goods to U.S. Sales." It's clear from the evidence that that's a reference to a NYMCO customer in the United States.

It goes on from there, but with regard to that particular telex, Exhibit 142, Mr. Chan testified that he did not know, in fact, at that point in time that NYMCO had obtained the goods, much less that they had delivered some or all of the goods in question to NYMCO's customer, U.S. Sales.

Mr. Chan in essence, in his testimony, asserted that that statement in the telex, in Exhibit 142, was a bluff, a gambit, if you will. Even had Mr. Chan suspected that the goods were released by April 17, 1986, I see no prejudice to the defendants in failing to assert a claim against the defendants until July.

Mr. Woolley has argued, really, something a little different than that. He is asking the court to read that telex/ infer from that telex, as I think one can, depending on whether you accept or reject Mr. Chan's testimony in this regard — but you certainly could infer from that telex that the goods have been released to NYMCO by the carrier in a manner inconsistent with surrender of a bill of lading, since presumably Mr. Chan had all the original bills of lading at this point in time.

From that, I think Mr. Woolley would like to infer something a little bit more than that, and that is that not only did Mr. Chan have that knowledge as at April 17th of 1986, but that you could infer that he had that knowledge perhaps weeks, if not months, prior to that date.

That is a possible inference, I grant you. And I think, again, I have to balance that out against Mr. Chan's testimony that: one, he did not in fact know that any goods had been released; that he made this statement in essence as a gambit; that, in the event that goods had been released and resold by NYMCO to its customer, U.S. Sales, he ought to get payment.

I must say, by the way — I don't mean to digress, but all of these telexes are put in an extraordinarily polite form, like, "I beg your pardon, but . . ." I think this telex starts off something like that.

I digress only because there is somewhat of a cultural undercurrent to the way certain things happened and the way certain things are said. But never have I seen, and I don't mean to suggest this in any way in a deprecating form, but such deference given between one party, in this case C-Art, to another part with whom it does business, which is NYMCO.

That, by the way is not part of the findings in this case; so, gentlemen, stop writing. I'm not trying to attribute that in any way to infer anything other than that probably two American companies would not deal with each other quite in this way.

In any event, I still think that that leaves, me, on this issue of knowledge on the part of C-Art, with a question of the credibility of Mr. Chan, as opposed to inferences that the defendants would have me draw from the statement Mr. Chan makes in the telex of April 17, 1986.

Having seen Mr. Chan on the witness stand, having heard the explanation about this and certain other matters, again I find that his testimony was not just "plausible" in this regard. I think it is plausible, but I also found him to be credible with respect to his testimony with respect to his state of knowledge at the time that the April 17, 1986 telex was sent.

In any event, all of the goods, by that point in time, in fact, it appears had been released to NYMCO; and at that point in time, the NYMCO bankruptcy was imminent. Apparently within four days, NYMCO petitioned for Chapter 11 protection in the Bankruptcy Court in the Federal Courts in New York.

So having said all that, I think it follows that I don't see that the defendants have made out an affirmative defense that would bar liability. And in accordance with the evidence, the court finds that there was a breach of the contract in the sum of $185,997.00.

There are a couple of issues that I want to touch briefly on with respect to the amount of damages. First of all, the defendants' counsel has contended that the losses or damages are limited to the $500.00 per "customary freight unit" — in quotes, "customary freight unit" — by virtue of the provisions of the Carriage of Goods by Sea Act, specifically 46 U.S.C. 1304(5), a provision limiting damages for loss to $500.00 per package or, if the goods are not shipped in packages, to $500.00 per, quote, "customary freight unit."

The first is a threshold matter, and from the evidence I find that the goods here had been — and this is reasonably inferable from the evidence and, in fact, I think it's consistent with Mr. Fradkin's testimony — that the goods had been offloaded at the time they were released by Hong Kong Islands Line to NYMCO. And under the authority of *International Harvester* and *Gold Medal Trading* and other cases cited at page 3 of the

plaintiff's Supplemental Brief, the limitation on damages found in Section 1304 of COGSA is inapplicable. The Act itself does not apply at that point in time.

Second, even if it did apply, I don't believe the court would look to — in fact, the court would not look to — the customary freight unit unless and until the court found that the goods were not shipped in packages. Here, all of the bills of lading that I've reviewed indicate a certain number of cartons being shipped on behalf of the shipper, C-Art; and in the context of these bills of lading, I find that these cartons are the functional equivalent of "packages" as used in Section 1304, if some court were to determine that COGSA applied.

I think that view, by the way, that interpretation, is supported by another case cited by plaintiff. That's *Hartford Fire Insurance v. Pacific Far East Lines*, which is 491 Fed.2d 960, a 9th Circuit case.

If COGSA applied, the number of cartons — I haven't made the computation, but I think Mr. Phillips might have the number of cartons or packages — shipped, multiplied by 500, results in a figure that far exceeds the total amount of loss in this case.

Next, defendants contend they're entitled to offset based upon a re-rating of rate charges, which goes back to a bulk freight shipping from the moment, or what's been referred to here as the service contract between NYMCO and Hong Kong Islands Line.

I don't think there's any question that Hong Kong Islands Line would have and did have a claim against NYMCO under the service contract. C-Art, as has been pointed out, was not a party to that contract, cannot be held liable for breach of that contract by NYMCO for any damages that NYMCO may owe to the defendant, Hong Kong Islands Line.

In view of the above, I do find that plaintiff's damages are not reduced by any of the defense reductions or offset, and they are $185,997.00.

With respect to imposition of maritime liens, the court has no intention of issuing a lien against a vessel as to which the evidence shows the vessel is owned by a foreign sovereign government. And so the application, at least at this time, for the imposition of a maritime lien is going to be denied.

I think really what we're talking about — and I think Mr. Phillips defined this a bit just a few moments ago — what we're talking about here is a situation in which, after entry of judgment, Hong Kong Islands Line doesn't promptly pay the judgment and/or there are not assets in the United States which can be readily executed upon, then there may be, and I would assume would be, some further proceedings in this lawsuit to see how — perhaps even discovery proceedings, to determine and locate assets that can be executed upon.

Finally, let me say that I'm going to ask Mr. Phillips to prepare and lodge, within two weeks if you could — if you could do it earlier, that would be fine; but within two weeks — findings of fact and conclusions of law and a proposed judgment consistent with the court's ruling this afternoon.

Do you think that is doable, Mr. Phillips?

Mr. Phillips: Yes, your Honor.

The Court: Is there any other matter that we need to take up at this time? (No audible response.)

Well, it was a very well tried case, gentlemen, and I will say, Mr. Woolley, that I don't mean to suggest anything other than that I thought some of the defense arguments were — they were certainly well presented, and I'm trying to say this in the right way, but I think they were somewhat imaginative, too.

Mr. Woolley: Thank you, your Honor.

The Court: And I mean that in the best sense of the term.

All right. Very well, gentlemen. The court will stand in recess.

(Proceedings adjourned.)

---0---

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Susan A. Lee
SUSAN A. LEE, CSR 2800, CM, RPR

DATED: September 1, 1989